IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.376 OF 2006

IN

NOTICE OF MOTION NO.3123 OF 2005

IN

S.C.SUIT NO.8293 OF 1989

WITH

CIVIL APPLICATION NO.468 OF 2006

Smt.Sarabai w/o Haji Ismail &
d/o Haroon Ismail Mistry ...Appellant

Versus

Smt.Aishabai wd/o Haroon Mistry
& Ors. ...Respondents

.....

Mr.Uraizee i/b Uraizee & Law Associates for Appellant.

Ms.Gauri Godse for Respondent No.5.

.....

CORAM: A.M.KHANWILKAR, J.

JUNE 19, 2006.

P.C.

1. Heard Counsel for both sides at length.

Perused the relevant pleadings and the decision of the Court below which is impugned in this Appeal from Order.

2. I find no reason to depart from the conclusion reached by the Trial Court in dismissing the Notice of Motion preferred by the Appellant. The Trial Court has recorded good reasons for reaching that conclusion. Suffice it to affirm the view taken by the Trial Court. However, in addition, I find substance in the argument of Counsel for Respondent No.5 that in fact, if the pleadings as filed before the Trial Court are perused closely, it will appear that absolutely no reason is indicated in the Application or the affidavit as filed by the Plaintiff as to the cause for non appearance on 13th September 2000 before the Trial Court. The other reasons which are mentioned in the pleadings by the Plaintiff, at best, can be said to be sufficient cause for condoning the delay in filing Notice of Motion.

3. Counsel for the Appellant/Plaintiff was called upon to advert to specific case made out in

the affidavit as to what prevented the Appellant/Plaintiff or for that matter, her Advocate to appear before the Trial Court on 13th September 2000. Learned Counsel fairly accepts that no specific case has been made out in that behalf either in the affidavit of Appellant/Plaintiff or the affidavit filed by her Advocate.

4. Viewed thus, the Respondent No.5 would be justified in contending that in such a case the question of allowing the application and setting aside the order passed on 13th September 2000 does not arise, for want of sufficient cause made out by the Plaitniff/Appellant. Reliance is placed on the exposition in the decision of the Division Bench of this Court in the case of **V.Pankajakshi Vasudevan & Ors. vs. Jayant J.Patwardhan reported in 2006(1) Mh.L.J. 784**.

5. To get over this position, Counsel for the Appellant would contend that the suit instituted by the Plaintiff/Appellant was not an adversary litigation. In such a case, the issue of setting

aside order dismissing Suit for default or for that matter, delay in taking out such application will have to be considered liberally.

6. I find no substance in this submission. No such distinction has been made in the provisions of either the Limitation Act or for that matter, Order IX of the Code of Civil Procedure to consider the matter liberally, even when the proceedings are not adversary litigation. Learned Counsel for the Appellant is not able to substantiate this submission on the basis of express provision or any reported decision.

7. Viewed thus, not a case for interference. Dismissed.

8. In view of the above order, Civil Application also stands disposed of.

9. At this stage, Counsel for the Appellant prays that the operation of this order and the order passed by the lower Court which is impugned

in this Appeal shall not be given effect to for some time to enable the Appellant to take up the matter in appeal before the Supreme Court. The request being reasonable, is granted. It is ordered that parties shall maintain status-quo as of today with regard to the suit property for a period of four weeks from today.

A.M.KHANWILKAR, J.